

BEFORE THE
Federal Communications Commission

WASHINGTON, D. C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the matter of)

Amendment of Section 73.202)

Table of Allotments)

FM Broadcast Stations.)

(Bradenton, Florida))

MM Docket No. 92-59
RM-7923

To: Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

REPLY TO CONSOLIDATED OPPOSITION TO MOTION TO STRIKE
AND RESPONSE TO REPLY

Sunshine State Broadcasting Company, Inc. ("Sunshine"), the petitioner herein, pursuant to Section 1.45 of the Commission's Rules, hereby submits its Reply to Consolidated Opposition to Motion to Strike and Response to Reply, filed September 4, 1992, by Entertainment Communications, Inc. ("Entertainment").

Again, while represented by Entertainment as an Opposition to the Motion to Strike, Entertainment takes the opportunity to submit additional documents in the nature of further comments, long after the comment period in this proceeding was closed. In fact, the alternate title to the Consolidated Opposition is Response to Reply, which is in itself an impermissible pleading. The justification submitted by Entertainment is somewhat novel. Entertainment argues that any information pertaining to the matter before the Commission should be considered by the Commission and, hence, its justification for the filing is simply to develop a full record. Were the pleadings to be accepted, the purpose of the rules would be vitiated, and it would be perfectly acceptable for

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any applicant or petitioner in any proceeding, regardless of established deadlines, to simply file additional comments. Entertainment's pleadings should be rejected.

Included as part of the Response to Reply portion of the Consolidated Opposition, Entertainment submits a September 3, 1992, letter from the Federal Aviation Administration. That letter is represented as an unambiguous confirmation "that the construction of such a tower at the Sunshine site will constitute a hazard to air navigation...." The letter does not say that, but it does state that

the proposed construction would exceed FAA obstruction standards and further aeronautical study is necessary to determine whether it would be a hazard to air navigation. (Emphasis added)

Far from the unambiguous statement of a determination of hazard, the letter clearly indicates that it is a preliminary determination based on the fact that the tower exceeded the 500 foot construction limit in Part 77 of the Federal Aviation Regulations. The letter goes on to state that if the tower height were reduced to 524 feet above sea level, it would not exceed the Part 77 obstruction standard; the letter further indicates that if the proponent of the tower is not willing to reduce the proposal to 524 feet, then the FAA will initiate a further study if it is requested "by the sponsor".

As Sunshine noted in its Reply to the Opposition to Joint Request for Approval of Settlement Agreement, or, Alternatively, Supplement to Comments of Entertainment Communications, Inc. filed on August 27, 1992, Entertainment has had its agents falsely

certify to the Federal Aviation Administration that it was the proponent of the construction of a tower at those coordinates. The Federal Aviation Administration has obviously spent time and resources considering this false proposal. In fact, in making the request, Entertainment asked for expedited consideration and apparently received it. Sunshine again submits that the Commission should not encourage false filings with the FAA; it is not in the public interest to have the Federal Aviation Administration considering, on an expedited basis, this false proposal when there are other legitimate applicants waiting their turns at the busy offices of the FAA.

The FAA's concern is also expressed in the letter of September 3. In bold capital letters, at the bottom of the letter the FAA states that "notice is required anytime the project is abandoned or the proposal is modified." Obviously, the very existence of this request must have some effect on the FAA's consideration of other proposals, navigational aids, airport requests, frequency considerations, etc. The Commission should not encourage bogus proponents to burden the Commission's records.

At footnote 1 on page 3 of its Consolidated Opposition, Entertainment protests unconvincingly that its "consultants did nothing disingenuous or misleading." A false certification is per se misleading. Entertainment observes that "a consultant will often in this manner seek the FAA's opinion about a potential transmitter site prior to filing an application with the Commission." This observation is accurate only when the consultant is representing a prospective applicant which itself is the true

proponent. Entertainment indicates that it was simply acting on Sunshine's behalf because Sunshine would be the proponent. That is the sort of representation that Sunshine does not need. The consultant indicated that, in addition to the filing of the request, he made numerous telephone calls to the FAA. Since they were seeking a determination of hazard, it must be presumed that the telephone calls were not in the best interests of Sunshine, and it can be further presumed that if it was such an obvious matter, why were such a large number of phone calls needed to convince the FAA specialist?

In any event, the FAA preliminary determination is not relevant under the Commission's policies and precedent. The letter is submitted for the proposition, one, that it is an unambiguous determination of hazard, which it is not, and two, that it is conclusive proof that no transmitter site could be found within the large allowable area identified by Entertainment in its Comments in this proceeding. The preliminary FAA letter deals only with the site specified in the bogus proposal; it does not purport to be an area-wide determination by the FAA.

Entertainment cites FM Table of Allotments (West Palm Beach, Florida), 6 FCC Rcd 6975 (1991), for the proposition that the suitability of a transmitter site must be resolved before an allocation can be approved. That is directly contrary to the holding in West Palm Beach, in which the Commission upheld its earlier finding "that Gannett had not shown that Taylor [would] be unable to locate a site which would comply with the Commission's minimum separation requirements and also meet FAA air-hazard


concerns, but rather only that it [might] be difficult to do so[.]"; the Commission further "noted that Gannett provided an in-depth analysis of potential air hazards at only one site...." (West Palm Beach, supra, at 6976.) The Commission went on to state that it had "followed [its] usual practice of deferring a determination as to the suitability of a transmitter site to the application stage when an actual site proposal is before the Commission," and that "although it would take into consideration a showing by a party that...no theoretical sites exist," no such showing had been submitted. Id. Neither is there such a showing in this proceeding.

Entertainment also cites FM Table of Allotments (Crestview and West Bay, Florida), 7 FCC Rd 3059 (1992), for the proposition that the suitability of a transmitter site must be resolved before and allocation can be approved. In fact, the holding is just the opposite. In Crestview and West Bay, the Commission stated that it would presume in rulemaking proceedings that a site was available, but that that presumption was rebuttable. In order to rebut the presumption, however, it must be shown that no fully-spaced site was available.

Entertainment's filings, permissible and impermissible, fall far short of that requirement.

Respectfully submitted,

SUNSHINE STATE BROADCASTING
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September 17, 1992

CERTIFICATE OF SERVICE


I, Prastavna Sinha, an employee of the law firm Borsari & Paxson, hereby certify that a true copy of the foregoing REPLY TO CONSOLIDATED OPPOSITION TO MOTION TO STRIKE AND REPSONSE TO REPLY was sent this 17th day of September, 1992, via first class United States mail, postage prepaid, to each of the following:

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